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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1973

NO. 73-547

JOE GUERRA,

Petitioner

VS.

STATE OF TEXAS AND
JOHN L. HILL, JR., AS
ATTORNEY GENERAL OF THE STATE OF TEXAS

Petition for Writ of Certiorari
to the Court of Criminal Appeals
of the State of Texas

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF FACTS	3
REASONS FOR GRANTING WRIT	5
OPINION - COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS	Appendix A-1 & 2

INDEX OF AUTHORITIES

CASES

Aguilar v. Texas, 378 U.S. 108 (U.S. Sup. Ct., 1964)	10
Giordenello v. United States, 357 U.S. 480 (U.S. Sup. Ct., 1958)	10
Johnson v. United States, 333 U.S. 10 (U.S. Sup. Ct., 1948)	10
Jones v. United States, 362 U.S. 257 (U.S. Sup. Ct., 1960)	11
Spinelli v. United States, 393 U.S. 410 (U.S. Sup. Ct., 1969)	10
United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (U.S. Sup. Ct. 1948)	7
United States v. Festa, 192 F. Supp. 160 (D.C. Mass, 1960)	7
United States v. Haywood, 284 F. Supp. 245 (D.C. La. 1968)	6

STATUTES

	Page
Texas Code of Criminal Procedure, Chapter 14, Article 14.01	7
Texas Code of Criminal Procedure, Chapter 14, Article 14.02	7
Texas Code of Criminal Procedure, Chapter 14, Article 14.03	8
Texas Code of Criminal Procedure, Chapter 14, Article 14.04	9
Texas Constitution, Article 1, Section 9	2
United States Constitution, Amendment IV	2
28 U.S.C. § 1257 (3)	2

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JOE GUERRA,

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STATE OF TEXAS AND JOHN L. HILL, JR.,
AS ATTORNEY GENERAL OF THE STATE OF TEXAS,

Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of the State of Texas

The Petitioner, JOE GUERRA, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Criminal Appeals of the State of Texas rendered in these proceedings on June 13, 1973.

OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Texas. Guerra vs. State of Texas, 496 S.W. 2d 92 (Tex. Crim. 1973), appears at Appendix A, infra, pp. 1 and 2.

JURISDICTION

The order or judgment of the Court of Criminal Appeals of the State of Texas was entered on June 13, 1973. The last action of the Court of Criminal Appeals occurred on July 3, 1973 when said Court overruled Petitioner's Motion for Rehearing. This Petition for Certiorari was filed less than ninety days from the last date mentioned hereinabove (July 3, 1973). The jurisdiction of this Court is invoked under 23 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

Whether the search of the person of JOE GUERRA was in violation of the rights of JOE GUERRA as set forth in the Fourth Amendment to the Constitution of the United States and as set forth in Article I, Sec. 9 of the Texas Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the State of Texas, Article I, Sec. 9:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no Warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

STATEMENT OF FACTS

This is a possession of heroin case. On or about April 26, 1971, GARY DAVIS, a police officer employed by the Lubbock Police Department, executed an affidavit in support of a search warrant stating Officer Davis' belief that narcotic drugs (heroin) and narcotic drug paraphernalia were being kept at a house located at 2602 Bates, Lubbock, Lubbock County, Texas. The affidavit also stated that the above described house was controlled by Appellant, JOE GUERRA. Said affidavit stated that Officer Davis' belief was based on information received from an unnamed informant. The affidavit further stated that the unnamed informant personally observed narcotic drugs and narcotic drug paraphernalia at 2602 Bates, Lubbock, Lubbock County, Texas, within 72 hours of the date of the affidavit and that Officer Davis had previously received correct information from the unnamed informant. Pursuant to the execution of the affidavit by Office Davis, a search warrant was issued by Charles Smith, a Justice of the Peace for Lubbock County, Texas. Said search warrant instructed the police officers executing the warrant to search the premises located at 2602 Bates, Lubbock, Lubbock County, Texas. The search warrant instructed the police officers to search the premises for narcotic drugs (heroin) and narcotic drug paraphernalia, and said search warrant further ordered that if any narcotic drugs or narcotic drug paraphernalia were found, the same were to be seized and brought before Justice of the Peace Charles Smith and that the Petitioner, JOE GUERRA, was to be arrested. This search warrant reads as follows: to wit:

> "THE STATE OF TEXAS, TO THE SHERIFF OR ANY PEACE OFFICER OF LUBBOCK COUNTY, SAID STATE: GREETINGS: WHEREAS, complaint in writing under oath has been made before me by Gary Davis, which complaint is hereto attached and expressly made a part hereof, and said complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance

of this warrant, you are therefore commanded forthwith to search the place therein named and described, to-wit: a house located at 2602 Bates, Lubbock, Lubbock County, Texas, being a green house with asbestos siding on the north side of the street facing south with an unattached tool shed occupied and controlled by Joe Guerra and Mary Lou Alvarez and a person or persons whose names and descriptions are unknown, where the said narcotic drug, to-wit: heroin and narcotic paraphernalia is alleged to be kept, possessed and concealed.

If you find that for which you are directed to search, you will seize the same and bring it before me at the Court House in said County on the _____ day of April, 1971, at _____ o'clock M.; and you will also arrest and bring before me at said place and time the said Joe Guerra and Mary Lou Alvarez and any person or persons unknown, accused of keeping, possessing and concealing the said narcotic drug and narcotic paraphernalia.

WITNESS MY SIGNATURE, on this _____day of April, 1971, at _____ o'clock _____M.

/s/_____
Justice of the Peace
Lubbock County, Texas"

(Emphasis supplied).

On the night of April 26, 1971, a number of police officers, armed with the above described search warrant, went to the premises located at 2602 Bates, Lubbock, Lubbock County, Texas. These police officers gained entry into said house through the front and side doors, and upon entry into said house, immediately handcuffed Joe Guerra and searched him for weapons. After the search of Joe Guerra for weapons had transpired, a search of the premises insued, said search

taking approximately 15 to 30 minutes. During the period of time it took the police officers to search the premises, Joe Guerra remained handcuffed and was, at all times, under police guard. The search of the premises revealed no narcotic drug or narcotic paraphernalia. At no time during the search of the premises did Joe Guerra attempt to escape or attempt, in any way, to impede the efforts of the officers conducting the search of the premises.

Subsequent to the fruitless search of the premises, Joe Guerra was taken by several police officers into the kitchen of the house situated at 2602 Bates, Lubbock, Texas and there was forced to remove his clothing. A search by the police officers of Joe Guerra's clothing revealed a small packet containing a white powder alleged to be heroin. Appellant was then advised of his rights and formally placed under arrest and was taken to the Lubbock County jail where he has remained.

REASONS FOR GRANTING THE WRIT

I. The search of the person of Joe Guerra was in violation of the rights of Joe Guerra as set forth in Amendment IV. to the United States Constitution and Article I, Sec. 9 of the Texas Constitution in that the search warrant in question did not extend to and authorize a search of the person of Joe Guerra, the search of Joe Guerra was not conducted incidental to a prior lawful arrest, and the search of the person of Joe Guerra was not supported by nor based on probable cause.

As has already been mentioned, the warrant issued simply did not authorize a search of "the person" of JOE GUERRA. No separate warrant authorizing either the arrest of JOE GUERRA unconditionally or the search of "the person" of JOE GUERRA was issued.

The record is utterly void of any testimony to the effect that an insufficient time existed to procure a specific warrant authorizing a search of the person of JOE GUERRA. To the contrary, the record reflects at

least the following evidence that indicates more than ample time in fact existed for the procurement of a specific "search of the person" warrant, to-wit:

(A) The officers had time to obtain a warrant authorizing a search of the premises, and

(B) A search of the premises ensued over a period of time while JOE GUERRA was handcuffed, offering no resistance, and considerable time was passing;

(C) Petitioner was initially frisked for weapons and none were found (S.F., P. 64); and he was being watched while several other officers searched the premises. The record reflects approximately seven or eight individuals were available and surely two of the individuals could be spared to go get a search of the person warrant.

Under even stronger facts and circumstances in favor of the state, than involved in the case at bar, it has been held that a search of a defendant's person under the color of a "search of the premises" warrant, cannot be justified for the same reason stated in Appellant's Motion to Suppress. Please see United States vs. Haywood, 284 F. Supp. 245 (D.C. La. 1968). In that case, the defendant was charged with possession of heroin. Narcotics agents obtained a warrant for the search of Haywood's house, but failed to obtain authority in the same or a separate warrant to search the person of defendant Haywood. After the narcotics agents executed the search warrant for the house and a search revealed no contraband, the defendant, Haywood, was searched and such search of the person revealed contraband. The Court held the search of the person was unauthorized and illegal. The Court noted that the search apparently occurred after the defendant had been detained and with respect to when the arrest occurred, stated, to-wit:

"It is immaterial, however, when the premises

were searched for it (search) produced no evidence of the law violation charged to the defendant***"
(Emphasis supplied)

The Court then concluded on page 250 on its opinion as follows, to-wit:

"A search warrant for a residence or other premises does not authorize the search of all persons who may be present." (Emphasis supplied)

Also, please see United States vs. Di Re, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (U.S. Sup. Ct. 1948); and United States vs. Festa, 192 F. Supp. 160 (D. C. Mass, 1960).

Additionally, an arrest made without an arrest warrant can only be a valid arrest if made in accordance with the provisions of Chapter 14 of the Texas Code of Criminal Procedure. Article 14.01 of the Texas Code of Criminal Procedure specifically provides as follows, to-wit:

> "A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view if the offense is one classed as a felony or as an offense against the public peace. A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."

Petitioner respectfully submits that at the time the police officers who were executing the search warrant gained entry into the house at 2602 Bates, Lubbock Lubbock County, Texas, Petitioner was committing no offense. The testimony given at the trial of this cause indicates Petitioner was merely standing in the front room of said house and offered no resistance of any kind to the police officers. Thus, it cannot be said that Petitioner committed an offense within the presence or view of the police officers.

Article 14.02 of the Code of Criminal Procedure provides as follows, to-wit:

> "A peace officer may arrest, without a warrant, when a felony or breach of the peace has been committed within the presence or within the view of a magistrate and such magistrate verbally orders the arrest of the offender."

Petitioner respectfully submits that this Article has no application to this case for the reason that no magistrate was present when the police entered the house at 2602 Bates, Lubbock, Lubbock County, Texas on April 26, 1971. There is no testimony in this cause to the effect that a magistrate was present at said time and place.

Article 14.03 of the Texas Code of Criminal Procedure provides as follows, to-wit:

> "Any peace officer may arrest without warrant, any person found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

The testimony as before stated, indicates that when the police officers entered the house located at 2602 Bates, Lubbock, Lubbock County, Texas, Petitioner was merely standing in the living room of said house and offered no resistance whatsoever to said police officers. It is inconceivable as to how the Petitioner standing in the living room of his own home and offering no resistance whatsoever to police officers, could be termed being found in a suspicious place and under circumstances which would reasonably show that Petitioner was guilty of some felony or breach of the peace or was threatening to commit some offense against the laws. Therefore, Petitioner respectfully submits that Article 14.03 has no application to this cause.

Article 14.04 of the Texas Code of Criminal Procedure provides as follows, to-wit:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant pursue and arrest the accused."

This Article has no application to this case because there existed time to obtain a search warrant. As indicated above, the police obtained a search warrant prior to searching the house located at 2602 Bates, Lubbock, Lubbock County, Texas. This being the case, the police officers obviously had time to obtain an arrest warrant. In addition, the affidavit previously mentioned contains no statement to the effect that Petitioner had committed an offense and was about to escape.

Because none of the above cited Articles of the Texas Code of Criminal Procedure apply to this case, Petitioner respectfully submits that there existed no grounds for his arrest without a warrant. Therefore, the search of his person by the police officers was invalid for the reason that said search was not conducted incident to a lawful arrest.

In summary, it is respectfully submitted that under the authorities cited under these three points, the general search of the premises warrant did not in fact extend to and authorize a search of the person of JOE GUERRA, as a matter of law; that there was no lawful search or search incidental to a lawful arrest; and there was a lack of probable cause for the search and arrest of JOE GUERRA, as such arrest was contrary to the terms and provisions of the Texas Code of Criminal Procedure. For all of such reasons mentioned, Petitioner's Petition for Writ of Certiorari should be granted.

II. The search of the person of JOE GUERRA was in violation of his rights as set forth in Amendment IV. to the United States Constitution and Article I, Sec. 9 of the Texas Constitution in that the affidavit in support of the search warrant in question does not reflect probable cause for the issuance of the search warrant in question because the affidavit was based on hearsay information from an unnamed informant and did not contain sufficient information to credit or corroborate the hearsay information and reliability of the unnamed informant.

It is conceded that an affidavit supporting a search warrant "may be based on hearsay information and need not reflect the personal observations of the affiant." Aguilar vs. Texas, 378 U.S. 108 (U.S. Sup. Ct., 1964).

However, Aguilar, supra and other authorities have held that while an affidavit supporting a search warrant may be based on hearsay information, the magistrate must be informed of some of the underlying circumstances on which the informant based his information and, the underlying circumstances from which the affiant concludes the informant is credible or his information reliable. Spinelli vs. United States, 393 U.S. 410 (U.S. Supt. Ct., 1969).

The authorities cited have held that the purpose behind the requirement that the informant's information be corroborated and that the affiant's belief in the reliability and credibility of the informant be corroborated is to insure that the determination as to the existence of probable cause for the issuance of a search warrant, will be made by a neutral and detached magistrate, and not by a police officer or the informant himself. Giordenello vs. United States, 357 U.S. 480 (U.S. Sup. Ct., 1958), and Johnson vs. United States, 333 U.S. 10 (U.S. Sup. Ct., 1948).

It is noted that in the case at bar, the only statement regarding the reliability and credibility of the informant is the following statement, to-wit:

"Affiant has received information from said reliable and credible informant on previous occasions and such information has proved to be correct."

The number of occasions is not stated. Also, affiant does not mention any information within affiant's knowledge that corroborates the credibility of the informant. No other statement regarding the reliability and credibility of the informant is contained in said affidavit. The magistrate in the case at bar was not informed of the specific type of information previously furnished the affiant by the informant, nor was the magistrate informed of the number of previous occasions on which the informant provided the information to affiant.

Petitioner respectfully submits that where, as is the case at bar, the affidavit is based solely on hearsay, and contains only a statement to the effect that "previous information has been furnished," then, the conclusions of the affiant based on hearsay, are not sufficient to "corroborate" or "credit" the hearsay information and/or the "reliability" of the unnamed informant.

A case that precisely illustrates factually and by the language used by the Court, Petitioner's contention that the affidavit in the case at bar is insufficient, is Jones vs. United States, 362 U.S. 257 (U.S. Sup. Ct., 1960). There, the affiant had other knowledge consistent with the information furnished by the unnamed informant, which is not the case here. In Jones, the Court pointed out the necessity that the hearsay information be sufficiently "credited." It was held that a statement in the affidavit to the effect that the defendant had been under surveillance and/or was known to be a "habitual user of narcotics" does sufficiently corroborate the "reliability" and hearsay information of the unnamed informant. There is a glaring distinction between the Jones case, supra, and the case at bar.

It is respectfully submitted that under the above authorities, a mere statement to the effect that information had been furnished by the same informant previously is wholly insufficient to credit or corroborate the reliability of the informant. Thus, the affidavit supporting the search warrant in the case at bar fails to set forth sufficient facts upon which a conclusion that probable cause existed, can be based.

Respectfully submitted,

WALTERS & ASSOCIATES
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1515 Avenue J
Lubbock, Texas 79401

ATTORNEYS FOR PETITIONER

By_____
JAMES A. WALTERS

January 25, 1974

COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JOE GUERRA, Appellant

NO. 46, 328, v. - - - Appeal from Lubbock County

THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for the offense of possession of heroin. The jury assessed punishment at forty years.

Appellant challenges the validity of the search conducted of his person. He contends that the search warrant did not unconditionally authorize his arrest and only authorized a search of the premises and did not extend to his person. He also attacks the affidavit upon which the warrant was issued, contending that it did not show sufficient probable cause.

The sufficiency of the evidence is not challenged.

We affirm.

This Court has held that an officer executing a valid search warrant has the right and duty to search persons found on the premises in the execution thereof. See Guzman v. State, 461 S.W. 2d 602; Johnson v. State, 440 S.W. 2d 308, and Hernandez v. State, 437 S.W. 2d 831. When the officers knocked on the door and identified themselves appellant observed them through a small window and then moved away. The officers knocked once more but were denied entrance. They saw a woman moving hurriedly to the bathroom and then heard a commode flush. Officers then used force to gain entrance and handcuffed the appellant.

The evidence shows that appellant had attempted to kill a Lubbock police officer once before and that he had been charged with assault on a police officer in connection with previous narcotics raids. After the premises were searched

without result, the handcuffs were removed from appellant so that he could be thoroughly searched. When the paper of "heroin" was found in the watchpocket of appellant's trousers, he attempted to grab it from the officer and swallow it. The handcuffs were again placed on him. There was probable cause to search appellant even if such was not authorized by the warrant. See Article 14.03, V.A.C.C.P., and Thompson v. State, 447 S.W.2d 175.

We hold this to have been a valid search. The officers were in the process of executing a valid search warrant based on probable cause and with it was the right to search persons on the premises. See Fisher v. State,____ S.W.2d ____ (No. 46,653, April 14, 1973)

Appellant argues that the affidavit upon which the warrant was issued does not contain sufficient corroborative information and that such affidavit is conclusionary and contains only hearsay information. Specifically, he contends that the personal observation by the alleged informant of the narcotics in appellant's premises, along with the allegation that the informant had given information in the past which had been proved to be "true and correct" is sufficient.

This affidavit is like the one in Hegdal v. State, 488 S.W.2d 782, where this Court held that personal observations of a reliable informant are sufficient for probable cause. We hold that the affidavit is sufficient to show probable cause.

No reversible error being shown, the judgment is affirmed.

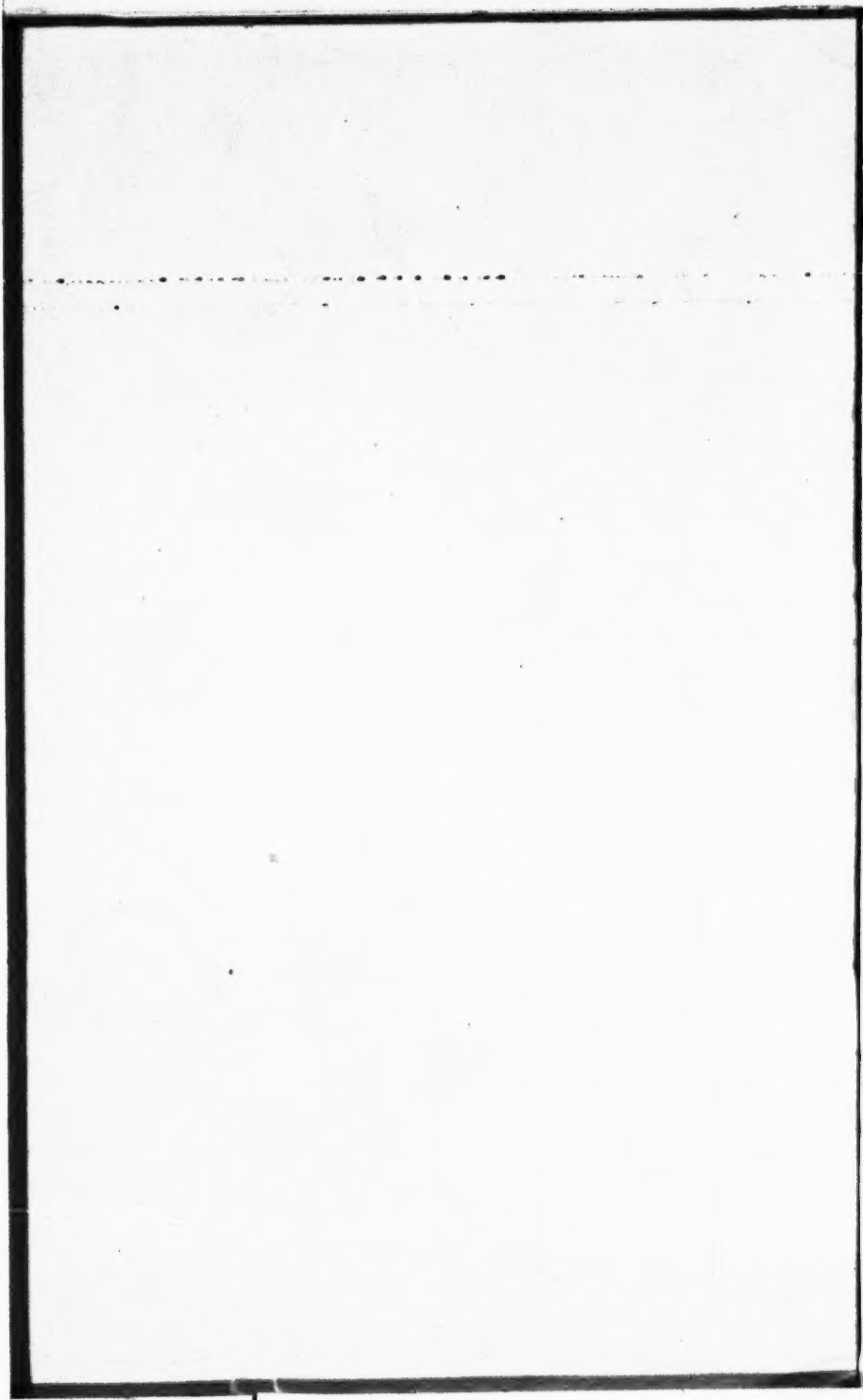
Douglas, Judge

(Delivered June 13, 1973)

CERTIFICATE OF SERVICE

I, JAMES A. WALTERS, do hereby certify that a copy of the above and foregoing Petitioner's for Writ of Certiorari has been deposited in the United States mail, postage prepaid, certified, on this the day of January, 1974, addressed as follows, Mr. Lonny F. Zwiener, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

James A. Walters
ATTORNEY FOR PETITIONER



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Respondent

• • •

Petition for Writ of Certiorari
to the Court of Criminal Appeals
of the State of Texas

• • •

RESPONDENT'S BRIEF IN OPPOSITION

• • •

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INDEX

SUBJECT INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2, 3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3, 4
ARGUMENT AND AUTHORITIES	4,5,6,7,8,9,10
CONCLUSION	10

CITATIONS

Aguilar v. Texas,
378 U.S. 1081 (1964) 8, 9

Guerra v. State of Texas,
496 S.W.2d 92 (Tex.Crim., 1973) 2, 3

Jones v. United States,
362 U.S. 257 (1960) 10

Spinelli v. United States,
393 U.S. 410 (1968) 9

United States v. Johnson,
475 F.2d 997 (D.C. Cir., 1973) 6

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STATE OF TEXAS AND JOHN L. HILL, JR.,
AS ATTORNEY GENERAL OF THE STATE OF TEXAS,

Respondent

Petition for Writ of Certiorari
to the Court of Criminal Appeals
of the State of Texas

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, for which review is sought here is reported in *Guerra v. State of Texas*, 496 S.W.2d 92 (Tex.Crim., 1973). A copy of that opinion is attached to the petition herein.

JURISDICTION

The formal jurisdictional requisites of the petition and its timely filing would appear to be satisfied although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

Although the Petitioner in the initial portion of his brief raises only the broad question of a violation of his Fourth Amendment rights, the latter portion of Petitioner's brief details two specific charges. Respondent will frame his questions to cover these charges.

1. Was the search of the person of Petitioner in violation of his rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution because the search warrant in question did not extend to and authorize a search of the person of the Petitioner, the search of the Petitioner was not conducted incidental to a prior lawful arrest, and the search of the person of Petitioner was not supported by nor based on probable cause?

2. Was the search of the person of Petitioner in violation of his rights as set forth in the Fourth Amend-

ment to the United States Constitution and Article I, Section 9 of the Texas Constitution, because the affidavit in support of the search warrant in question did not reflect probable cause for the issuance of the search warrant and because the affidavit was based on hearsay information from an un-named informant and did not contain sufficient information to credit or corroborate the hearsay information, and reliability of the un-named informant?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution are involved here.

STATEMENT OF THE CASE

Petitioner was indicted for the unlawful possession of a narcotic drug (to wit: heroin) by a grand jury for the 140th District Court of Lubbock County, Texas. He was tried before a jury and convicted. Petitioner's record of two prior felony convictions for burglary and murder without malice was introduced along with evidence as to Petitioner's character and reputation. The jury assessed his punishment at forty (40) years in the Texas Department of Corrections. The Court of Criminal Appeals of Texas affirmed this conviction. *Guerra v. State of Texas*, 496 S.W.2d 92 (Tex.Crim., 1973).

On April 26, 1971, Detective Gary Davis of the Lubbock Police Department signed an affidavit before the Honorable Charles Smith, Justice of the Peace of Lubbock County, Texas, stating that the narcotic drug heroin and narcotic paraphernalia were being unlawfully possessed at 2602 Bates, Lubbock, Lubbock County, Texas, which

address was occupied and controlled by Petitioner Guerra and Mary Lou Alverez and a person or persons whose names and descriptions were unknown. Detective Davis stated in his affidavit that his reliable and credible informant had personally observed such narcotic drug and paraphernalia upon the premises within seventy-two (72) hours of the signing of the affidavit and that Detective Davis had received information from this informant in the past which had proved to be true and correct.

Judge Smith issued a search warrant for the premises and it was served by Detective Davis and other officers on the same date. Petitioner denied the officers entry into the premises and reasonable force was used to gain entry. Petitioner was handcuffed to prevent disposal of evidence and for the protection of the officers conducting the search. The said officers knew of prior threats made by Petitioner against other officers and of assaults upon officers by Petitioner in the past. (R. 187). The handcuffs were subsequently removed from Petitioner in order to conduct a thorough search of his person, as he was specifically named in the search warrant. A quantity of heroin was discovered in his pants pocket. Petitioner then attempted to swallow or otherwise dispose of the heroin and was restrained and handcuffed again, placed under arrest and warned of his rights.

ARGUMENT AND AUTHORITIES

1. The search of the person of Petitioner was not in violation of his rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution because the search of the person of Petitioner was based on

probable cause and because Petitioner was not arrested until after the narcotics had been found on his person.

Petitioner contends that a warrant to search a particular premises does not carry with it the right to search the person or the people occupying and controlling said premises. In the instant case, the search warrant was issued because a reliable informant made known to the police that he had seen heroin at 1602 Bates, Lubbock, Texas, within seventy-two hours of the issuance of the warrant. It is undisputed that said premises were occupied and controlled by Petitioner. The police, in conducting their search of the premises, had probable cause to search the person of Petitioner. The officers executing the warrant may search all parts of the premises which would reasonably be expected to afford a haven or cache for the items sought in the search. If stolen television sets are the subject of the search, the officers may look in the various rooms, in closets and in other areas where television sets could be secreted. If stolen diamonds or heroin are the subject of the search, then the officers may look into small drawers, search the pockets of garments hanging in closets, look under bed clothes, examine medicine and kitchen cabinets and other areas where small items could be hidden away.

In connection with the search for small items of evidence, contraband, or stolen merchandise, a person on the searched premises must necessarily occupy the same position as a piece of furniture, a household fixture, or a piece of wearing apparel that may be hanging in a closet or draped over the back of a chair. Any person on the premises is much like a piece of furniture—his pockets are

areas where the items for which the search is conducted may be located.

A decision philosophically supporting the search made in the present case *United States v. Johnson*, 475 F.2d 997 (D.C. Cir., 1973). The search of a purse was involved in that case, but the reason the court gave for upholding the search makes that decision analogous to the instant case (475 F.2d at 979):

> "In *Walker v. United States*, 117 U.S.App.D.C. 151, 327 F.2d 597, 600 (1963), cert. denied, 377 U.S. 956. 84 S.Ct. 1635, 12 L.Ed. 2d 500 (1964), this court permitted the search of a wallet and bag held by one who shared occupancy of the residence searched under authority of a warrant, holding that a contrary result 'would be to suggest that a warrant to search premises may be frustrated by the device of simply picking up the guilty object and holding it in one's hand.' Similarly here, frustration of the warrant's purpose should not be permitted where the facts reveal that to be the likely result were the purse not searched. See *Clay v. United States*, 246 F.2d 298, 304 (5th Cir.), cert. denied, 355 U.S. 863, 78 S.Ct. 96, 2 L.Ed.2d 69 (1957). . . ."

The facts in the instant case reveal that the search of the Petitioner occurred in the course of the search of the premises rather than after and apart from such search as the Petitioner contends. The Lubbock police officers, after obtaining the search warrant (R. 128, 152) went to Petitioner's premises, knocked on the door, identified themselves, and stated their purpose. Petitioner looked at the officers through a small window and moved off (R. 128, 153). The officers knocked again, but were denied entry (R. 154). A woman in the house was observed

moving hurriedly to the bathroom and a commode was flushed. The officers then forcibly entered the premises (R. 128, 154, 182, 208). An officer, exercising his right of reasonable restraint, then handcuffed Petitioner to prevent further disposal of evidence and for the protection of the officers and Petitioner based on the knowledge of Petitioner's dangerous propensities (R. 183, 185, 187, 188). A search of the premises was commenced some ten or fifteen minutes later (R. 191), during the course of said search, the handcuffs were removed from Petitioner so that he could be thoroughly searched. During that search, a "paper" of heroin was found in the watch pocket of Petitioner's pants (R. 191, 233, 234). Petitioner then attempted to take the heroin from the officer and to swallow it. The officers were forced to struggle with Petitioner to regain the heroin, and the handcuffs were again placed upon Petitioner. After, and only after, the heroin was discovered in Petitioner's pocket was he advised that he was under arrest and warned of his rights pursuant to the arrest warrant contained in the search warrant (R. 175, 189). Until that time, the officers testified that, although he was being temporarily detained until the search was completed, the Petitioner would have been released if no contraband had been found (R. 175, 188, 189).

The officers, therefore, had probable cause to search Petitioner. Petitioner was named in the warrant as owning and occupying the premises, Petitioner was on the premises when the officers arrived, and the narcotic that was the subject of the search was capable of being concealed on one's person. A ruling that a person owning and occupying a premises could not be searched under a warrant to search that premises would set up a zone of

safety for a person who may be selling heroin or concealing small, stolen property. This judicially created zone of safety would thusly frustrate the purpose of obtaining a search warrant.

2. The search of the person of Petitioner was not in violation of his rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution, because the affidavit in support of the search warrant in question did reflect probable cause for the issuance of the search warrant and because the information upon which the warrant was issued was supplied by a reliable informant who had personally seen heroin on the premises of the Petitioner.

Petitioner raises the question of whether the affidavit upon which the issuance of the search warrant was based established sufficient probable cause for the issuance of such warrant.

The affidavit in this case, in substance, stated that the affiant based his belief that heroin was being unlawfully kept upon Petitioner's premises upon information received from reliable and credible informant, that the said informant had personally observed heroin on the premises within seventy-two hours of the making of the affidavit, and that the affiant had received information from the said informant on previous occasions which had proven to be true and correct.

An affidavit for a search warrant may be based upon hearsay information and need not reflect the direct personal observations of the affiant. *Aguilar v. Texas*, 378

U.S. 108 (1964). The *Aguilar* case set out a two prong test by which the sufficiency of such hearsay information is to be tested:

> "(1) There must be contained in the affidavit some underlying circumstances from which the informant concluded that the contraband was where he claimed it to be.
>
> "(2) There must be contained in the affidavit some circumstances to show why the informant is deemed to be reliable."

It is respectfully submitted that both parts of the *Aguilar* test have been met by the affidavit in this case, the first part by the personal observation of the heroin upon the premises by the informant within seventy-two hours of the affidavit and the second by the previous successful reliance upon information furnished the affiant by the informant. Of course, further corroboration of the informant is only required where one of the *Aguilar* tests is not met.

In the case of *Spinelli v. United States*, 393 U.S. 410 (1968), Mr. Justice White, in a concurring opinion, deals precisely with the facts establishing cause for the issuance of a search warrant in a case like the one at hand:

> "If the affidavit rests on hearsay—and informant's report—what is necessary under *Aguilar* is one of two things: The informant must declare either (1) that he has himself seen or received the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it . . . The first presents few problems: since the report, although hearsay, purports to be the first hand observation, remaining

doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant . . ."

Thus personal observation of the informant coupled with previous successful reliance by the officer-affiant upon information from that informant clearly satisfied the *Aguilar* test.

Petitioner relies upon *Jones v. United States*, 362 U.S. 257 (1960), a case which preceded *Aguilar* by four years. *Jones* deals with an affidavit or a search warrant containing matters different from the present case, however in upholding that affidavit, the court stated that merely the belief of the affiant or his informant that there is probable cause to search will not be sufficient, but that personal observations of another will be sufficient where there is a substantial basis for crediting the information of that informant.

It is respectfully submitted that the affidavit of Detective Davis, wherein he states that his informant had personally observed heroin upon premises occupied and controlled by the Petitioner and that he had previously successfully relied upon information furnished by the said informant, clearly meets both prongs of the *Aguilar* test and establishes probable cause for the issuance of a valid search warrant.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been deposited in the United States mail, postage prepaid, certified, on this the _____ day of January, 1974, addressed as follows: Mr. James A. Walters, Walters and Associates, Attorneys at Law, 1515 Avenue J, Lubbock, Texas 79401.

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